SUPREME COURT U. S.

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SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. ——— 526

DAN SHERIDAN O'LEARY, III,
WILLIAM MURRELL,
KHRISTINA LEWIS, and
ROGER A. WOOCK, - - - - - - Appellants,

—Against—

COMMONWEALTH OF KENTUCKY, - - Appellee.

On Appeal form the Court of Appeals of Kentucky.

JURISDICTIONAL STATEMENT.

ROBERT ALLEN SEDLER,
3461 Keithshire Way,
Lexington, Kentucky 40503,

ROGER B. SLEDD,
1504 First National Bank Building,
Lexington, Kentucky 40507,

Attorneys for Appellants.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. _____

DAN SHERIDAN O'LEARY, III,
WILLIAM MURRELL,
KHRISTINA LEWIS, and
ROGER A. WOOCK, - - - - *Appellants,*

v.

COMMONWEALTH OF KENTUCKY, - - *Appellee.*

ON APPEAL FROM THE COURT OF APPEALS OF KENTUCKY.

JURISDICTIONAL STATEMENT.

THE OPINION BELOW.

The opinion of the Court of Appeals of Kentucky, affirming the convictions of the appellants, is reported in Southwestern Reports, Second Series, Vol. 441, page 150. A copy of the opinion is set forth as Appendix A. No opinion was rendered by the court of first instance.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

1. This is an appeal from a conviction of breach of the peace, in violation of Kentucky Revised Statutes, 437.010. The appellants were convicted of the offense in the Circuit Court of Fayette County, Kentucky, and

their conviction was affirmed by the Court of Appeals of Kentucky. The essential contention of the appellants is that their conviction was violative of their rights under the First and Fourteenth Amendments to the Constitution of the United States. Both in the lower court and in the Court of Appeals the appellants drew into issue the validity of Kentucky Revised Statutes, 437.010 (hereinafter referred to as KRS 437.010), on the ground of its being repugnant to the First and Fourteenth Amendments, and the decision was in favor of its validity.

2. The decision of the Kentucky Court of Appeals, together with the opinion, was rendered on May 9, 1969. Under Kentucky law a decision of the Court of Appeals does not become final until the mandate is issued. The mandate is ordinarily issued thirty days after the opinion is delivered unless a petition for rehearing is filed. Rules of the Kentucky Court of Appeals, R 1.340. The appellants did not file a petition for rehearing in the Court of Appeals, and the mandate was issued on June 10, 1969. A copy of the mandate is set forth as Appendix B. Notice of Appeal to this Court was filed in the Court of Appeals of Kentucky on June 27, 1969. A copy of the Notice of Appeal is set forth as Appendix C.

3. Jurisdiction of the appeal is conferred by Title 28, U.S.C. § 1257(2).

4. Cases sustaining the jurisdiction of this Court are: *Cox* v. *State of Louisana*, 379 U. S. 536 (1965); *Mills* v. *State of Alabama*, 384 U. S. 214 (1966); *Lovell* v. *City of Griffin*, 303 U. S. 444 (1938); *Charleston Fed-*

eral Savings and Loan Association v. *Alderson,* 324 U. S. 183 (1945).

5. The proceedings involve a challenge to the validity of KRS 437.010, which provides as follows:

> "Any person who is guilty of a breach of the peace, riot, rout, unlawful assembly or affray shall be fined not more than one hundred dollars or imprisoned for not less than five nor more than fifty days, or both."

Kentucky Revised Statutes, Vol. 4, Tit. 437, P. 66 (1962).

QUESTIONS PRESENTED BY THE APPEAL.

1. Whether KRS 437.010 on its face and as authoritatively construed, is unconstitutional as vague and overbroad in violation of the First and Fourteenth Amendments to the Constitution of the United States?

2. Whether the application of KRS 437.010 to the appellants in the case at bar violates the First and Fourteenth Amendments to the Constitution of the United States in that the appellants have been convicted solely for engaging in protected acts of expression?

3. Whether the appellants have been deprived of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, in that the record is totally devoid of evidence to support a conviction for breach of the peace, and that, in effect, the appellants were convicted of the offense of trespass, for which they were not charged?

STATEMENT OF THE CASE.

The appellants were regularly enrolled students at the University of Kentucky on November 6, 1967, when the Defense Intelligence Agency (D.I.A.) and other prospective employers were holding recruiting interviews on the University of Kentucky campus. These interviews were being conducted on the second floor of the Old Agricultural Building in the Placement Service hallway. The appellants and other regularly enrolled students undertook to protest against D.I.A.'s presence on the university campus and to dissuade students from accepting employment with the agency. In the morning Associate Dean of Students Hall met with the group of student protestors in order to establish the conditions under which the protest could take place. At that time the students were permitted to make their protest on the second floor of the Old Agricultural Building where the Placement Service was located. The protest essentially consisted of passing out leaflets. By the morning's end approximately seventeen students were engaged in the protest and five members of the press were also present.

The D.I.A. interviews were to take place at 1:30 p.m. Shortly before 1:00 p.m. Associate Dean Hall and Assistant Dean Brandenburg met with the recruiters from the D.I.A. and other agencies. The recruiters from the D.I.A. set forth certain conditions that would have to be met in order for them to stay (R. 58-59). Apparently one of these conditions was that the protestors would have to leave the second floor, where the

recruiting was to take place, for Associate Dean Hall then stated:

> "At approximately 1:00, after talking with the various agencies and their representatives that were doing placement in the Ag Building, it was determined that we were unable to continue the operation of the Placement Service with any amount of normality" (R. 38).

According to Assistant Dean Brandenburg, Associate Dean Hall told the students that:

> ". . . a point in time had been reached where their presence was constituting an interference and interruption of the University Placement Service Activities, and he asked them to remove themselves either to the general or the public lobby area on the first floor or to the outside of the building, either place they chose, but that the circumstances at that point made it necessary for him to ask them to remove themselves because they were interfering with the operation of the Placement Service" (R. 60-61).

All of the students and the press representatives then left the floor with the exception of the four appellants.

The appellants stood in the entrance to the alcove which led to three rooms, two of which were to be used at 1:30 p.m. by the D.I.A. They refused to leave when requested by Associate Dean Hall and moved inside the alcove, sitting down on the floor in front of the doorways to the two rooms to be used by the D.I.A. During the time they were present in the alcove, in the words of the Court of Appeals, ". . . they did not raise

their voices in a loud or boisterous manner, use profanity, or physically attack anyone and did not directly prevent anyone from entering any of the rooms. This was equally true of their conduct throughout the day." 441 S. W. 2d at 153. Associate Dean Hall then called the campus police, who asked the appellants to leave and advised them that if they did not leave, "they would be arrested and charged with breach of the peace." *Ibid.* When they still refused, they were arrested by the campus police, and without offering any resistance, were carried down the stairs and out of the building into the waiting campus police cruiser. As a result of the removal of the appellants the D.I.A. was able to carry out its interviews without having any protestors present on the second floor.

The appellants were tried for breach of the peace in the Lexington Police Court. Their constitutional challenges were rejected, and they were convicted and sentenced to fifty days imprisonment and to pay a fine of $100, the maximum penalty under the statute (R. 2). An appeal was then taken to the Fayette Circuit Court, and under Kentucky law such an appeal entitled the appellants to a trial *de novo*. In the Circuit Court their motion to dismiss based on the unconstitutionality of KRS 437.010 under the federal and Kentucky constitutions was overruled, and the case proceeded to trial before a jury (R. 31-32). At the conclusion of all the evidence appellants moved for a directed verdict, which was also denied (R. 98-99). The judge instructed the jury that under Kentucky law:

> "A breach of the peace is a violation of public order or decorum; the offense of disturbing the public peace. By 'peace' is meant the tranquility enjoyed by the citizens of the community, where good order reigns among its members." 441 S. W. 2d at 154.

He also instructed the jury that they should find the appellants guilty if they believed that the appellants:

> ". . . . did wilfully and intentionally commit a breach of the peace by interfering with the ordinary and normal functions of the Placement Service on the campus of the University of Kentucky by blocking the entrance to the Placement Service. . . ." 441 S. W. 2d at 153.

The jury found the appellants guilty and fixed the punishment of each at a fine of $75.

On appeal to the Kentucky Court of Appeals, the conviction of each appellant was unanimously affirmed, and the constitutional challenge to the validity of KRS 437.010, on its face and as applied, was rejected. In so doing the Court stated that the "conduct of the appellants could have amounted to a breach of the peace only after their right to be present at the time and place in question had been terminated," 441 S. W. 2d at 154, so that the basis of the conviction was the failure of the appellants to leave the premises when ordered to do so by the Association Dean of Students and the campus police. The Court also held that the conduct of the appellants in failing to leave when ordered constituted a breach of the peace under Kentucky law, con-

trary to the contention of the appellants that they were entitled to a directed verdict on the ground that there was no evidence to support their conviction for the offense. Following the issuance of the mandate by the Kentucky Court of Appeals, appellants filed Notice of Appeal to this Court.

STATEMENT OF THE REASONS WHY THE QUESTIONS PRESENTED ARE SO SUBSTANTIAL AS TO REQUIRE PLENARY CONSIDERATION.

The case presents substantial questions concerning the right of university students to peacefully protest against non-academic activities being conducted on the university campus and concerning the power of a state to employ the common law concept of breach of the peace to punish persons engaging in acts of expression. Previous decisions of this Court in cases such as *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Edwards* v. *South Carolina*, 372 U. S. 296 (1963), and *Cox* v. *Louisiana*, 379 U. S. 538 (1965), would seem to preclude a state from employing the common law concept of breach of the peace to punish persons engaged in acts of expression. Likewise, in *Ashton* v. *Kentucky*, 384 U. S. 195 (1966), this Court prohibited Kentucky from punishing persons under the common law offense of seditious libel on the ground that the concept of breach of the peace was embodied in that offense, so as to render it unconstitutionally vague and overbroad. In that case the Kentucky Court itself stated that "the ancient broad common law concept of what constituted a 'breach of the peace' is no longer a constitutional

basis for imposing criminal liability." *Ashton* v. *Commonwealth,* Ky., 405 S. W. 2d 562 (1965). In the case at bar, in order to sustain the convictions of the present appellants, the Court repudiated that statement. 441 S. W. 2d at 156. Its action calls into question the basis of the decisions of this Court in *Cantwell, Edwards, Cox, Ashton,* and similar cases, where this Court has held that in the area of First Amendment rights the government may regulate "only with narrow specificity." *NAACP* v. *Button,* 371 U. S. 415, 433 (1963). The Kentucky Court also holds that a peaceful sit-in by students at a university building becomes illegal and shorn of First Amendment protection whenever a university official orders the students to leave the particular area, irrespective of the number of students involved, the purpose of the protest, whether it in fact has interfered with the rights of others, and whether or not the intention of the university official was to stifle the exercise of expression. The campus of a state university is likened to private property, and according to the Court, "the privilege of an enrolled student to use and occupy the property of a school is and should be subject to the will of its governing authorities." 441 S. W. 2d at 157. By so holding it calls into question the decisions of this Court in case after case upholding the right to conduct peaceful sit-ins and demonstrations on public or private property. *Cox* v. *Louisiana, supra; Garner* v. *Louisiana,* 368 U. S. 157 (1961); *Brown* v. *Louisiana,* 383 U. S. 131 (1966). Finally the Kentucky Court held that the sitting in and refusal to disperse when ordered, without more, justified a con-

viction for breach of the peace. This, it is submitted, is inconsistent with the decisions of this Court in cases such as *Garner* v. *Louisiana, supra; Thompson* v. *City of Louisville,* 362 U. S. 199 (1960); *Gregory* v. *City of Chicago,* —— U. S. ——, 89 S. Ct. 946 (1969), where the Court found that the record was totally devoid of evidence to support a conviction of the offense charged.

A. KRS 437.010, on Its Face, and as Authoritatively Construed, Is Unconstitutional, as Vague and Overbroad in Violation of the First and Fourteenth Amendments to the Constitution of the United States.

A peaceful sit-in or demonstration where the protestors "did not raise their voices in a loud or boisterous manner, use profanity, or physically attack anyone and did not prevent anyone from entering a place" is a form of expression entitled to the protection of the First Amendment. *Edwards* v. *South Carolina,* 372 U. S. 229 (1963); *Cox* v. *Louisiana,* 379 U. S. 538 (1965); *Garner* v. *Louisiana,* 368 U. S. 157 (1961).

While a state may constitutionally regulate this type of expression and punish abuses, it may only do so by a narrowly-drawn statute dealing with a specific type of conduct which the state may legitimately prohibit. *Adderley* v. *Florida,* 385 U. S. 39 (1966).

Ever since *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940), it has been held that the common law offense of breach of the peace could not be employed to punish one who was attempting to engage in a constitutionally-protected act of expression. Such punishment was "analogous to a conviction under a statute sweeping

in a great variety of conduct under a general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its application." 310 U. S. at 308. That principle was reaffirmed in *Edwards* v. *South Carolina, supra,* involving the common law offense, and in *Cox* v. *Louisiana, supra,* where the Court invalidated a statute that prohibited "congregating with others 'with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned." In *Ashton* v. *Kentucky,* 384 U. S. 195 (1966), the Court invalidated a conviction for the common law offense of seditious libel, likening that offense to the offense of breach of the peace, which was condemned in *Cantwell.* It concluded that:

> "All the infirmities of the conviction of the common-law crime of breach of the peace as defined by Connecticut judges are present in this conviction of the common-law crime of criminal libel as by Kentucky judges." 384 U. S. at 201.

The case at bar squarely presents the question of whether the common law crime of breach of the peace, as defined by Kentucky judges, is now a constitutional basis for imposing criminal liability despite the holdings of this Court in *Cantwell* and *Ashton.*

The definition of the offense of breach of the peace by the Kentucky Court of Appeals in the case at bar, 441 S. W. 2d at 154, which must be accepted as authoritative by this Court, *Winters* v. *New York,* 333 U. S. 507 (1948), is as follows:

> "The term 'breach of peace' is generic, and includes all violations of public peace or order or acts tending to the disturbance thereof. The offense may consist of acts of public turbulence or indecorum in violation of the common peace or quiet, of an invasion of the security and protection which the law affords every citizen, or of acts such as tend to excite violent resentment." *King* v. *Commonwealth,* 32 Ky. L. Rep. 79, 80, 105 S. W. 419 (1907).

Aware that the literal language is admittedly broad, the Court in the case at bar went on to say that "lawful and proper conduct does not constitute a breach of the peace just because it provokes violence or disorder." It then stated that "the lawful exercise of a constitutional right cannot be a breach of the peace," citing *West* v. *Commonwealth,* 208 Ky. 735, 271 S. W. 1079 (1925). It concluded that "we, therefore, do not feel that the law against breach of the peace, as it has been thus construed in Kentucky, is so vague or overly broad in scope as to pose any threat to the rights of free speech and assembly guaranteed by the First and Fourteenth Amendments of the Constitution of the United States." It adds that, "Indeed, it occurs to us that if there is any uncertainty in this context, it is not because the tried and settled law of breach of the peace is vague, but because the burgeoning scope of constitutional protections has become so." 441 S. W. 2d at 154.

Certainly it is true that, in terms of ultimate result, the lawful exercise of a constitutional right cannot be a breach of the peace. But this is true of any offense, even one prescribed under a narrowly-drawn

statute. A conviction will always be reversed where the statute is applied to constitutionally-protected conduct. This is something very different from the void on its face doctrine, as developed by decisions of this Court. As this Court observed in *NAACP* v. *Button*, 371 U. S. 415, 432-433 (1963):

> "The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper interpretation. These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. Because First Amendment freedoms need breathing space to survive, the government may regulate in the area only with narrow specificity."

The possibility of application of the common law concept of breach of the peace, as defined by the Kentucky Court, cannot help but have a chilling effect upon the exercise of "provocative" First Amendment freedoms, notwithstanding the possibility that after a prosecution has occurred, particular conduct may be found to have been "constitutionally protected."

More significantly, the very case which the Court of Appeals cited for the proposition that "the lawful exercise of a constitutional right cannot be a breach of the peace," saw that Court *sustaining a conviction for*

breach of the peace where the appellant was clearly engaged in constitutionally protected conduct. In *West* v. *Commonwealth, supra,* the conduct relied on to sustain the conviction was that the defendant led a Ku Klux Klan parade in which the marchers were masked and were carrying "provocative" banners. In holding that the defendant could properly be convicted of breach of the peace, the Court made the following observations: (1) the Ku Klux Klan was popularly understood to antagonize certain religions and races; (2) judicial officers considered a masked parade on the street a violation of the law and so advised the defendant, who was also the chief of police; (3) provocative banners were carried; (4) a large crowd was present. It concluded that:

> "Whatever the intent, it was sufficient to provoke an answer, and under the circumstances, was calculated to arouse violent resentment and retaliation in the opposing party. If, instead of the printed words, the language quoted had been shouted by the marchers, it must be admitted that this would have disturbed the onlookers and created a breach of the peace. It seems to us that under all the circumstances it was for the jury to say whether or not such offense was committed." 271 S. W. at 1081.

A decision more contrary to the decision of this Court in *Terminiello* v. *Chicago,* 337 U. S. 1 (1949), both in terms of holding and rationale, cannot be imagined. The Kentucky Court in *West* permitted a conviction for breach of the peace to be sustained if the parade and speech "stirred people to anger, invited public dis-

pute, or brought about a condition of unrest." That, this Court said in *Terminiello,* cannot be done. 337 U. S. at 5.

By the very case it cites to support the proposition that the offense of breach of the peace, as construed by the Kentucky courts, is not unconstitutionally vague and overbroad, the Kentucky Court of Appeals proves the opposite. *West* v. *Commonwealth* makes it very clear that constitutionally-protected conduct *can* constitute a breach of the peace in Kentucky. While the Court says in the case at bar that lawful and proper conduct may not constitute a breach of the peace just because it provokes violence and disorder, when faced with the specific question, it upheld a conviction solely on the ground that in the circumstances the expression was provocative, and hence, "unlawful." Quite contrary to the assertion of the Kentucky Court, 441 S. W. 2d at 155, *West* v. *Commonwealth,* which the Court cited approvingly, *does* indicate "that the law against breach of the peace did then and does now prohibit constitutionally protected conduct."

All the infirmities of the conviction of the common law crime of breach of the peace as defined by Connecticut judges are equally present in the conviction of the common law crime of breach of the peace as defined by Kentucky judges—and maybe even more so. If it is true that "because First Amendment freedoms need breathing space to survive, the government may regulate in the area only with narrow specificity," Kentucky may not constitutionally convict the present appellants under its breach of the peace statute.

B. The Application of KRS 437.010 to the Appellants in the Case at Bar Violates the First and Fourteenth Amendments to the Constitution of the United States in That the Appellants Have Been Convicted Solely for Engaging the Protected Acts of Expression.

It is not disputed that the conduct for which the appellants were convicted was the "sit-in" or "blocking" of the entrance to the rooms to be used by the D.I.A. and the refusal to leave when ordered. There was no interference with any person's use of the premises, nor was there even a hostile crowd threatening counteraction. Cf. *Cox* v. *Louisiana,* 379 U. S. 436 (1965). The appellants were four in number, protesting "by their silent and reproachful presence" the recruiting that was about to take place, but they had not by their actions made it impossible for the recruiting to go on as scheduled. The situation differs markedly from that in *Adderley* v. *Florida,* 385 U. S. 39 (1966), for example, where some 200 demonstrators had congregated at the jail entrance, making it impossible for vehicles to enter.

Recognizing this and recognizing that there was no narrowly-drawn trespass statute, as in *Adderley,* the Kentucky Court held the sit-in of the present appellants was not constitutionally protected, because "the premises of a public college or university were no different from private property." 441 S. W. 2d at 156. Since this was so, the Court reasoned, the university officials could exclude the students from the place where they were and the failure of the students to leave when

ordered could constiutionally be punished as a breach of the peace. The Court stated:

> "The privilege of an enrolled student to use and occupy the property of the school should be subject to the will of its governing authorities. If he is told to stay out of a particular room, building, or familiar trysting place, he enters it as a trespasser. Here, the appellants entered the area in question by lawful permission, implied if not express, and albeit their acts and conduct were not illegal, and not a breach of the peace, they were in a place from which the university had the right to exclude them. Their conduct in remaining thus assumed a different cast and significance after they had been asked to leave. They knew then that they were in a place they had no right to be." 441 S. W. 2d at 150.

In view of the Kentucky Court, then, since the premises of the university were equivalent to private property, university officials had an absolute right to exclude the appellants, and their failure to leave constituted a breach of the peace, which the state could constitutionally punish.

The campus of the University of Kentucky in Lexington is an open one. It is a "small city," in which some 15,000 students, over 1,000 faculty members, thousands of employees, and numerous other people enter every day. There are no guards preventing pedestrian entry onto the campus or into any building. It is certainly as open to the public as was the courthouse building in *Cox* v. *Louisiana*, 379 U. S. 536 (1965), or the department store in *Garner* v. *Louisiana*,

368 U. S. 157 (1961), or the library in *Brown* v. *Louisiana*, 383 U. S. 131 (1966). It is not built for security purposes and closed to the public, as was the jail in *Adderley* v. *Florida*, *supra*. If anything, a university is the place where free expression should be encouraged and only the most exigent of circumstances should justify any restriction.

However, even accepting the analogy to private property, "the more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the constitutional rights of those who use it." *Marsh* v. *Alabama*, 326 U. S. 501, 506 (1945). The facilities of the university, including the second floor of the Old Agricultural Building were open to the general public, and the appellants, as students in the university, certainly had no less right than anyone else to be there. Moreover, they were there for a specific purpose, to protest the recruiting by the D.I.A. at the place where the protest would be most effective—the site of the recruiting. Only the most compelling of circumstances could have justified the exclusion of the protestors from the second floor. But they were excluded, and all left save the four appellants, who did nothing but sit in front of the entrance to the rooms that were going to be used for the recruiting. They should not be deemed to have lost the protection of the First Amendment on the ground that they were "in a place where they had no right to be." They were not on property that was closed to the general public.

It may be conceded that the university "had the power to preserve the property under its control for

the use to which it is lawfully dedicated." *Adderley* v. *Florida, supra.* But as this Court made clear in *Adderly,* that power may not be exercised to suppress First Amendment rights, and may be exercised only where the necessity is evident (and pursuant to a narrowly drawn statute). Most importantly, "the governmental interest must be unrelated to the suppression of free expression and the incidental restriction on alleged First Amendment freedom can be no greater than is essential to the furtherance of that interest." *United States* v. *O'Brien,* 391 U. S. 367 (1968).

The reasoning of the Kentucky Court in upholding the conviction of the present appellants would not satisfy these requirements. Whenever a university official, for whatever reason, decided that students should not be in a particular place, he could order them to leave, "since their privilege to use and occupy the property of a school should be subject to the will of its governing authorities." If a group of students were given permission to conduct a meeting in a particular room, and during the meeting the students criticized American foreign policy, presumably a univeristy official could order them to leave, and if they failed to do so, they could be convicted of a breach of the peace. The University's control of its space would thus entitle it to license expression therein. Cf. *Marsh* v. *Alabama, supra.*

In the case at bar the legitimate interest of the university officials was in preventing tangible interference with the recruiting that was going on in the building.

No such tangible interference occurred, either by the presence of the protestors on the second floor, or by the presence of the appellants in the alcove after the other protestors were ordered to leave. As admitted by the Court of Appeals, the entire nature of the protest had been non-violent, and it was not reasonable to anticipate that violence would suddenly occur. At the time that the four appellants were ordered to leave, it could not be said that they would have physically interferred with the recruiting or have engaged in improper conduct. Perhaps their presence there and their sitting in "silent reproachment" would have succeeded in dissuading other students from being recruited by the D.I.A., but a peaceful sit-in, like peaceful picketing, does not lose its constitutional protection because people might be dissuaded from dealing with the object of the protect. *Thornhill* v. *Alabama*, 310 U. S. 88 (1940). There was no hostile crowd of opponents, if that were relevant. Cf. *Brown* v. *Louisiana*, 383 U. S. 131, 133 note 1 (1966). In the circumstances of the case at bar, the university officials had no legitimate interest in requiring the appellants to abandon their sit-in at the time the order to leave was given, just as they had no legitimate interest in banning all the protestors from the second floor.

More significantly, there is evidence in the record which shows rather conclusively that the purpose of the officials in ordering the protestors to leave the second floor and the appellants to leave the alcove was directly related to the suppression of free expression, namely that the students were ordered to leave, because

the D.I.A. insisted on this as a condition for their continued recruiting. Where speech and non-speech elements are combined in the same course of conduct, as in the case of a sit-in, the governmental interest in regulating that conduct must be unrelated to the suppression of free expression. *United States* v. *O'Brien, supra.* Where governmental regulation has been upheld, as in *Adderley* v. *Florida, supra,* this Court pointed out that "There is not a shred of evidence in this record that this power was exercised, or that its exercise was sanctioned by the lower courts, because the sheriff objected to what was being sung or said by the demonstrators or because he disagreed with the objectives of their protest." 385 U. S. at 47.

In the case at bar, however, the record reveals that the demonstrators were ordered to leave the second floor and the appellants to leave the alcove precisely because the D.I.A. objected to the protest and because the university officials wished to accommodate the D.I.A. Assistant Dean Brandenburg stated this quite explicitly:

> "The recruiters [from D.I.A.] came in and talked with Dean Hall regarding what conditions would have to be met in order for them to stay . . .
>
> "Mr. Hall stated to this group [the protestors] that a point in time has been reached where their presence was constituting an interference and interruption of the University Placement Service Activities, and he asked them to remove themselves either to the lobby area on the first floor—the Placement Service is on the second floor—He

> asked them to remove themselves either to the general or the public lobby area on the first floor or to the outside of the building, either place they chose, but that the circumstances at that point made it necessary for him to ask them to remove themselves because they were interfering with the operation of the Placement Service" (R. 59-61).

The "circumstances" making it necessary for him to ask them to remove themselves were the demands by the D.I.A. that they not be permitted to make their protest at the site of the recruiting. The "interference" with the operation of the Placement Service was that the D.I.A. refused to hold the interviews if the protestors were present on the second floor. The appellants were ordered to leave, and punished for their refusal, in a clear effort to suppress the expression in which they were engaged.

At the time the appellants were arrested and charged with the offense of breach of the peace, the protest remained orderly and non-violent. The appellants had not laid hands on anybody and were not attempting to interfere with the recruiting operations by anything other than their physical presence at the site of the recruiting. The second floor of the building, where the offices of the Placement Service were housed, was, as it normally is, open to the public. The only justification for upholding the conviction that the Court of Appeals has advanced was that the building was like private property and the appellants could be ordered to leave at the will of the university authorities. While the state, "no less than a private owner of

property, has the power to preserve the property under its control for the use to which it is lawfully dedicated." *Adderley* v. *Florida, supra,* it may not exercise this power for the purpose of suppressing free expression. This is what occurred in the case at bar.

The appellants have been convicted solely for engaging in constitutionally-protected acts of expression. Since no legitimate interest of the state was impaired by their engaging in such acts, the conviction cannot stand.

C. The Appellants Have Been Deprived of Due Process of Law in Violation of the Fourteenth Amendment in That the Record Is Totally Devoid of Evidence to Support a Conviction for Breach of the Peace, and That, in Effect, the Appellants Were Convicted of the Offense of Trespass, for Which They Were Not Charged.

Throughout the proceedings in the state courts the appellants have contended that their sitting in the alcove and refusing to leave when ordered did not constitute a breach of the peace under Kentucky law. The contention of the appellants, as stated by the Kentucky Court of Appeals, was "that the evidence cannot support a conviction for breach of the peace under any set of instructions." 441 S. W. 2d at 158.

This the Court of Appeals rejected, although as it also stated, "During the time they were present in the alcove they [the appellants] did not raise their voices in a loud or boisterous manner, use profanity, or physically attack anyone and did not directly prevent anyone from entering any of the rooms." 441 S. W. 2d at 153.

The appellants argued that convictions for breach of the peace had been sustained by the Kentucky Court of Appeals only in the following situations: (1) the commission of an overt act of violence, see *Smith* v. *Commonwealth*, 102 Ky. 546, 257 S. W. 720 (1924); (2) the commission of obscene or indecent conduct, see *Hines* v. *Commonwealth*, 308 Ky. 859, 215 S. W. 2d 1014 (1948); and (3) the use of obscene or "fighting words," likely to provoke retaliation, see *Delk* v. *Commonwealth*, 166 Ky. 39, 178 S. W. 1129 (1915). The Court of Appeals did not dispute this argument, but observed that "as in the instance of murder and other common law crimes, it may be committed in new ways if they fall within the interdict of the old principles." 441 S. W. 2d at 154.

However, in holding that the conduct of the appellants amounted to a breach of the peace, the Court predicated its decision on the fact that they failed to obey an order of university officials to leave the premises, and that as of that time they were *trespassers*. The Court stated:

> "The privilege of an enrolled student to use and occupy the property of a school is and should be subject to the will of its governing authorities. If he is told to stay out of a particular room, building or familiar trysting place, he enters it as a trespasser. Likewise, if he is directed to leave it he remains as a trespasser." 441 S. W. 2d at 157.

The appellants were convicted of the offense of breach of the peace, because in the view of the Kentucky Court of Appeals, they had become trespassers on university

property and had refused to comply with an order to disperse.

At the time of the sit-in, there was no failure to disperse statute in Kentucky, as there is now. See KRS 437.014. There has never been a general criminal trespass statute, although certain specific acts such as trespassing on railroad property are criminally interdicted. See *e. g.*, KRS 433.395. However, in the case of trespass to the public property of the state, such as a university, a specific sanction *is* provided, but it takes the form of a civil proceeding in which a fine may be assessed by the jury . See KRS 56.010, 433.490. Trespass is also a common law offense, see *State* v. *Tyndall*, 192 N. C. 559, 135 S. E. 451 (1926), and in Kentucky persons may be prosecuted for common law offenses not otherwise prescribed by statute. See *Gibson* v. *Commonwealth*, Ky., 328 S. W. 2d 162 (1959); *Ashton* v. *Commonwealth*, Ky., 405 S. W. 2d 562 (1965), rev'd., 384 U. S. 195 (1966). Punishment for such offenses is specifically provided. KRS 431.075.

Appellants were not charged with the common law offense of trespass, nor did the state pursue the civil remedy for trespass against state property. Instead appellants were charged with the offense of breach of the peace. The record is totally devoid of evidence to support a conviction for breach of the peace as that offense has generally been defined in Kentucky and elsewhere. *The only evidence relied on to support the conviction for breach of the peace is that the appellants were trespassers.* A conviction totally devoid of evidentiary support is violative of due process of law.

Thompson v. *City of Louisville*, 362 U. S. 199 (1962); *Garner* v. *Louisiana*, 368 U. S. 248 (1961); *Gregory* v. *City of Chicago*, ——— U. S. ———, 89 S. Ct. 946 (1969). Moreover, this Court may find that the conviction was totally devoid of evidentiary support, even though the highest court of the state has held that the evidence was sufficient. *Gregory* v. *City of Chicago, supra.* It is irrelevant, of course, that the evidence in the case at bar might prove the commission of the offense of trespass, for "It is as much a denial of due process to send an accused to prison following conviction for a charge that was never made as is to convict him upon a charge for which there is no evidence to support that conviction." *Gregory* v. *City of Chicago, supra; Garner* v. *Louisiana, supra; Cole* v. *Arkansas*, 333 U. S. 196 (1948). There was no evidence to support the conviction of the appellants for breach of the peace except for the fact that in the view of the Kentucky Court of Appeals, they were trespassers. Since they were charged with breach of the peace and not trespass, a conviction for breach of the peace in these circumstances cannot be sustained. The facts in the case at bar are very similar to those in *Garner* v. *Louisiana, supra*, and the same result should obtain.

In an effort to sustain the conviction of the present petitioners, the Kentucky Court of Appeals has attempted to equate their "trespass" with a breach of the peace, stating "that an entry without actual force, although against the will of the owner, with a purpose expressed at the time when obtaining the possession not to surrender it, is a breach of the peace was estab-

lished in this state as long ago as 1884." It cites the case of *Johnson* v. *Clem*, 82 Ky. 84 (1884), in support of this proposition. In that case, however, the right of the trespasser to be on the land had terminated *prior to the time of the entry in question*, one of the members of the trespassing party carried a gun, and the trespassers stated that they would hold the land by violence if necessary. And, unlike the case at bar, the original entry was against the will of the owner. The "rule," as stated by the Court of Appeals in that case was that: "Where one is in possession of his own land and another with himself and hands enters thereon, against the will of the owner, and when requested to leave, by violent and abusive language announces his purpose to hold the possession, the entry and holding is forcible, and constitutes a breach of the peace." 82 Ky. at 86. That case is certainly not authority for the proposition that the conduct of the present appellants constituted a breach of the peace.

Finally, the Kentucky Court of Appeals states that the presence of the appellants constituted a breach of the peace because it "invited the owner to eject the intruder by force." Under this reasoning any trespass, even if totally non-violent, as in the case of the present appellants, necessarily amounts to a breach of the peace, because it incites the owner of the property to resort to violence. If every trespass necessarily amounted to a breach of the peace, it is strange that these were separate offenses at common law, and that the Kentucky legislature felt the necessity of making trespass a distinct offense. It is also strange that the Ken-

tucky Court, which has previously held that every act of disorderly conduct did not constitute a breach of the peace, see *City of Mt. Sterling* v. *Holly*, 108 Ky. 621, 57 S. W. 621 (1900); *City of Pineville* v. *Marshall*, 222 Ky. 4, 299 S. W. 1072 (1927), now implies that every act of trespass does.

There is no evidence to support the conviction of the present appellants for the offense of breach of the peace except for the fact that in the view of the Kentucky Court the appellants were trespassers on private property. Any attempt to assimilate this non-violent trespass to the offense of breach of the peace is plainly transparent. The appellants were denied due process of law in that their convictions for breach of the peace were totally devoid of evidentiary support and in that they were convicted of the offense of trespass, for which they were not charged.

CONCLUSION.

For the reasons aforesaid, it is submitted that the Court should note probable jurisdiction upon the appeal filed herein.

Respectfully submitted,

ROBERT ALLEN SEDLER,
3461 Keithshire Way,
Lexington, Kentucky 40503.

ROBERT B. SEDLER,
1504 First National Bank Building,
Lexington, Kentucky 40507,

Attorneys for Appellants.